SHUKERIAH ABAS

v.

KETUA SETIAUSAHA PERBENDAHARAAN & ORS

HIGH COURT MALAYA, KELANTAN
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: 22-65-1995]
28 JUNE 2000

CIVIL PROCEDURE: *Execution - Garnishee proceedings - Garnishee proceedings against government - When judgment may be enforced against government - Rules of the High Court 1980, O. 73*

CIVIL PROCEDURE: *Execution - Garnishee summons - Garnishee summons against government - Whether consent of Minister of Finance necessary prior to filing of summons - Government Proceedings Act 1956, s. 35*

TORT: *Negligence - Breach of statutory duty - Failure of government department to respond promptly to letters - Whether statutory duty established*

On 15 October 1985, the plaintiff had obtained judgment ('the order') against a company, Rampai Muda Development Sdn Bhd ('Rampai') for a judgment sum of RM1,042,524.05. The plaintiff however had failed to enforce the order. On 17 September 1991, the plaintiff had obtained information that the government of Malaysia ('the third defendant') had made a payment of RM1.25m to the creditors of Rampai. The plaintiff subsequently obtained leave of the court pursuant to O. 46 of the Rules of the High Court 1980 on 4 January 1992 to execute the order that had by this time lapsed.

Despite having obtained leave to extend the order, the plaintiff, for some unexplained reason, had not acted promptly by filing the necessary garnishment summons. She instead communicated first with the defendant, in the hope of obtaining consent from the Minister prior to the filing of the necessary papers. There was no prompt reply from the Ministry resulting in the order having expired again.

On 17 September 1995, the plaintiff filed a suit against the defendants alleging that the defendants had been liable or vicariously liable by being negligent in their failure to speedily reply to her letter that had merely requested for the consent letter from the Minister of Finance – and that

had the reply been sent earlier, the plaintiff would have had sufficient time to take the appropriate action to prevent the exhaustion of the funds by the government for the benefit of Rampai and its creditors.

The cause of action was founded in tort, issues being: (i) whether the government was under a duty to reply to the plaintiff's letters; (ii) whether the suit was founded on a cause of action known in law; (iii) whether the plaintiff could garnish the government of Malaysia, considering that the government was never indebted to Rampai; and (iv) even if the plaintiff could garnish the government, whether there was any legal necessity for the plaintiff to obtain the consent first prior to the filing of the garnishment summons.

Held:

[1] There is no such legal maxim or foundation that permits a cause of action founded on the complacent attitude of a government department. Liability may only arise on the part of the relevant government agency if there was a duty imposed by a specific statute. Mere omission to act when there is no duty to act does not give rise to any cause of action even when damage is caused.

[2] Since there was no debt owing by the government to Rampai, the former could not have been garnished. To succeed in garnishing the government, the plaintiff must establish that a debt is owed by the government to Rampai and that the judgment debtor possesses a legal right capable of enforcing judgment against the government.

[3] Nothing in s. 35 of the Government Proceedings Act 1956 indicates that prior consent from the government is required before filing the garnishment proceedings summons. The course of action adopted by the plaintiff therefore resulted in time being wasted and the order having lapsed. There was therefore nothing to prevent the plaintiff from filing the action first, and later to obtain consent *via* the formal channels of communication or by applying for a subpoena against the Minister of Finance.

[Suit dismissed.]

Case(s) referred to:
Brandon v. Osborne, Garrett & Co [1924] 1 KB 548 ***(refd)***
Dawson v. Bingley UDC [1911] 2 KB 149 ***(refd)***
Fellows v. Thornton [1885] 14 QBD 335 ***(refd)***
Hassan Mustaffa v. Registrar of Motor Vehicles, Selangor [1983] 1 MLJ 401 ***(refd)***
Haynes v. Harwood [1935] 1 KB 146 ***(refd)***
Holtby v. Hodgson [1889] 24 QBD 103 ***(refd)***

Kedah Kilang Papan Sdn Bhd v. Hansol Sdn Bhd (Tekabina Advisory Services Sdn Bhd, Garnishee) [1988] 2 CLJ 194 ***(refd)***
Koon Hoi Chow v. Prelam [1972] 1 MLJ 180 ***(refd)***
Lochgelly Iron and Coal Co v. M'Mullan [1934] AC 1 ***(refd)***
Morgan v. Aylen [1942] 1 All ER 489 ***(refd)***
Padu Ehsan Sdn Bhd v. Binaan Johanesa Sdn and PKNM (Garnishee) [1994] 2 CLJ 69 ***(refd)***
Potts or Riddell v. Reid [1943] AC 3 ***(refd)***
Saw Swan Kee v. Sim Lim Finance (M) Bhd [1985] 2 CLJ 356 ***(refd)***
Square v. Model Farm Dairies (Bournemouth) Ltd [1939] 2 KB 365 ***(refd)***

Legislation referred to:
Government Proceedings Ordinance 1956, s. 35(3)
Rules of the High Court 1980, O. 46(1), (2), O. 49 r. 1, O. 73 r. 13(2)

Other source(s) referred to:
Charlesworth on Negligence, p 22

For the plaintiff - Lua Kok Hiyong; M/s Lua & Mansor
For the defendants - Azman Abdullah (Ruzaimah Ridzuan FC)

Reported by Mariette Peters-Goh

JUDGMENT

Suriyadi Halim Omar J:

The plaintiff on 15 October 1985 had successfully obtained judgement against a company called Rampai Muda Development Sdn. Bhd (hereinafter referred to as "Rampai"), for a judgement sum of RM1,042,524.05. Despite that success the plaintiff failed to enforce the order against the latter as around that period it was going through difficult times. Five years, eleven months and seven days later, sometime on 17 September 1991, the plaintiff by chance read in the vernacular media that the government of Malaysia had made a payment of RM12.5 million to the creditors of Rampai. Smelling satisfaction of her unpaid debts, the plaintiff successfully obtained leave from the court pursuant to O. 46(2)(1) of the RHC 1980, on 4 January 1992 to execute 15 October 1985 order that had lapsed. Even though six years have elapsed since the judgement date a judgment creditor, the plaintiff in this case, can still proceed against a garnishee (*Fellows v. Thornton* [1885] 14 QBD 335). The course of action the plaintiff had in mind was the attachment of that debt, known as garnishee proceedings as against the government of Malaysia. To comprehend her course of action, I can do no better than reproduce O. 49 r. 1 of the Rules of the High Court 1980, which amply explains the steps of her intentions. This rule reads:

> (1) Where a person (in this Order referred to as the "judgement creditor") has obtained a judgement or order for the payment by some other person (in this Order referred to as "the judgement debtor") of money, ... and any other person within the jurisdiction (in this Order referred to as the "garnishee") is indebted to the judgement debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgement creditor the amount of debt due or accruing to the judgement debtor from the garnishee...

Had that 'any other person' or garnishee, been an ordinary member of the public unconnected to the Federal or State Government, the plaintiff *vide* the above "attachment of debts" action could have recovered that debt owing to the judgement debtor without much complication (see *Padu Ehsan Sdn Bhd v. Binaan Johanesa Sdn and PKNM (Garnishee)* [1994] 2 CLJ 69 on meaning of "Government"). The latter statement is made as, with the Government to be garnished, O. 73 r. 13 of the Rules of the High Court 1980 takes centre stage. It reads:

> (1) No order:
>
> (a) for the attachment of debts under O. 49;
>
> (b) …
>
> shall be made or have effect in respect of any money due or accruing due, or alleged to be due or accruing due, from the government.

If not for the provision of s. 35 of the Government Proceedings Ordinance 1956, which permits attachment of moneys payable by the government, an interested party that desires to garnish the government would be left unsatiated. With the availability of a platform to garnish the government, such a party need only to serve the summons supported by affidavits, within four days before the return date as provided for under O. 73 r. 13(2). Apart from that, the interested party under s. 35(3) must produce in court the written consent of the Minister of Finance, in the case of an order sought against the Federal Government. Over and above that, to succeed in the above garnishment or "attachment of debt" action, any interested party, *inter alia*, must have a debt due or accruing (*Saw Swan Kee v. Sim Lim Finance (M) Bhd* [1985] 2 CLJ 356; *Kedah Kilang Papan Sdn Bhd v. Hansol Sdn Bhd* (*Tekabina Advisory Services Sdn Bhd, Garnishee)* [1988] 2 CLJ 194).

Returning to the salient facts of this case, despite having obtained that leave to extend the lapsed order of 15 October 1985, the plaintiff for some unexplained reason had not acted promptly by filing the necessary garnishment summons. She instead communicated first with the defendants, in the hope of obtaining the consent from the Minister prior to the filing of the necessary papers. She wrote no less than nine letters to the defendants, with the last being a letter dated 2 January 1995. This course of action even though was procedurally correct, unfortunately was detrimental to her cause as the infamous government servant lackadaisical attitude confronted her with all its force, resulting in the relevant revived court order to expire again. After that lapse, the order was never to be re-extended. The response to her many requests for that statutory requirement eventually materialised in a form of a letter dated 7 January 1995, denying her that consent, on the ground that "semua pampasan telah selesai di bayar kepada syarikat berkenaan (all monies had been paid to the relevant company)". In brief the Ministry of Finance had replied that there were no more funds available to be held back, and channeled to the plaintiff, as full payments had already been made to Rampai. Not surprisingly the plaintiff on being rebuffed felt cheated. She contended that, as per her letter dated 22 August 1995, had it not been for the delay in the reply by the defendants, she would have been successful in enforcing the 15 October 1985 order, hence the current suit.

Apart from the above backdrop, there was a further twist to the facts in that in actuality the government of Malaysia was never at any time indebted to Rampai, or its creditors. To appreciate this statement I herewith lay down in brief the salient background facts of this saga for clarification, and why the government of Malaysia was unnecessarily dragged into the affray. The facts adduced *vide* the affidavits and agreed documents revealed that the Lady Templer Hospital located in Cheras, Kuala Lumpur had been privatised in 1985, with Rampai contracted to administer it. By July 1986 this hospital and Rampai encountered financial difficulties resulting in both being wound-up in the same year and 24 March 1994 respectively. Creditors picked up the cudgel and suits were filed against Rampai, causing a furore in the medical world, much to the chagrin and interest of the patients and populace of Cheras. To alleviate any deterioration of the situation, and to avoid the loss of the hospital to a third party, the government for no other reason except to shoulder its social responsibilities, assumed the administration of that hospital in December 1986. To resolve the matter once and for all, the government picked up the tabs of Rampai, by paying off all the debts of the creditors, irrespective of its dearth of liability. That latter fact unfortunately was not appreciated by the public let alone by the plaintiff.

On 17 September 1995 the plaintiff filed a suit against the government of Malaysia, then the only defendant, with the statement of claim being amended later, wherein the first and second defendants were subsequently roped in as co-defendants. In brief the plaintiff alleged that the defendants had been liable or vicariously liable by being negligent in their failure to speedily reply her letters that had merely requested for the consent letter from the Minister of Finance. It was also contended that had the only reply by the defendant been sent earlier, the plaintiff would have had sufficient time to take the appropriate action to prevent the exhaustion of the funds held by the government, for the benefit of Rampai and its creditors. As per her statement of claim, the cause of action in a nutshell was founded on tort, in that the defendants had failed in their duty toward her. In the circumstances of the case, due to that delay which had caused her substantial financial loss, a sum of RM4,257,496.84, inclusive of interest or in the alternative a lump sum of RM740,007.79 was claimed as damages. Some interesting questions were posed during the hearing, *inter alia*, whether:

a) the government was under a duty to reply the plaintiff's letters;

b) this suit was founded on a cause of action known/unknown in law;

c) in the circumstances of the case, as the government was never indebted to Rampai, the plaintiff could garnish the government of Malaysia; and

d) even if the plaintiff could garnish the government of Malaysia, whether there was any legal necessity for the plaintiff to obtain the consent first prior to the filing of the garnishment summons? Could she not have filed the papers first so as to avoid obviation of the order due to lapse of time, and thereafter request for the consent order?

Having gone through the rituals of a hearing, and having sieved the materials before me my conclusions were as follows, in sequence:

1) for question (a) the answer must be in the negative. No evidence was adduced, or for that matter any law adverted to that could indicate that the government was under a common law or statutory duty to reply. I came across no legal maxim or foundation based on the evidence adduced that permits a cause of action founded on the breathless complacency attitude of a government department. Agreeably a liability may arise on the part of the relevant government agency, or for that matter the government, if imposed with a duty by a relevant statute, if any. The action would be in respect of a kind of harm that

the hypothetical statute intended to prevent; the legislature decides the question of standard and obligations, and accordingly non-compliance with the provisions of the statute carries with it the same civil consequences that a verdict of negligence would do (*Lochgelly Iron And Coal Co. v. M'Mullan* [1934] AC 1/29). In that event such failure of duty, universally termed as statutory negligence, a cause of action that is quite independent of other form of tortious liability, remedy may be sought only by the party meant to benefit by that duty (*Dawson v. Bingley U.D.C* [1911] 2 KB 149/159; *Square v. Model Farm Dairies (Bournemouth) Ltd* [1939] 2 KB 365/375; *Koon Hoi Chow v. Pretam* [1972] 1 MLJ 180; *Hassan bin Mustaffa v. Registrar of Motor Vehicles Selangor* [1983] 1 MLJ 401). It must be emphasised that in a scenario illustrated above, the plaintiff must prove that the hypothetical statute adverted to, do provide the duties and statutory obligations of the supposed recalcitrant government officers clearly. Lord Porter in *Potts or Riddell v. Reid* [1943] AC 3/31 had occasion to say:

> When a statutory duty is imposed, if it be absolute the degree required is the fulfillment of the statutory obligation. If it be not fulfilled the person on whom the duty is imposed is negligent: see *Lochgelly Iron and Coal Co. Ltd v. M' Mullan*.
>
> (To complete the effect of the above statement, any exemption of duty towards any person requiring provisions that must similarly be provided in the clearest of terms, see *The Straits Steamship Co. Ltd v. Lieut J H Owen* [1932] MLJ 167);

2) founded on the facts adduced, and relying on the reasons stated in the paragraph immediately above, I could not but conclude that the cause of action which the plaintiff undertook was certainly unsound and unknown in law. It is trite law that a mere omission to act when there is no duty to act certainly gives rise to no cause of action even when damage is caused (*Charlesworth on Negligence* p. 22; *Haynes v. Harwood* [1935] 1 KB 146/161; *Morgan v. Aylen* [1942] 1 All ER 489; *Brandon v. Osborne, Garrett & Co.* [1924] 1 KB 548/554);

3) as there was no debt owed by the government to Rampai it definitely could not have been garnished. One must bear in mind that for a third party, in this ease the plaintiff, to succeed in garnishing the government it must first establish that a debt is owed by the latter to Rampai (as the judgement debtor). Similarly, the judgement debtor must possess that legal right, capable of enforcing payment against the government, if it desires so (per Lopes LJ in *Holtby v. Hodgson* [1889] 24 QBD 103/108); and

4) having perused s. 35 of the Government Proceedings Act 1956, I was satisfied that nothing was indicated in that provision that demanded prior consent from the government, before filing the garnishment proceedings summons. Due to the course of action undertaken by the plaintiff, time was wasted and the order again lapsed. There was practically nothing to prevent the plaintiff from filing the action first, and later to obtain the consent *via* the normal channels of communication or by applying for a subpoena against the Minister of Finance, and in the course of the proceedings have the written consent produced. Court proceedings and subpoenas have a way of encouraging personalities to be co-operative.

It was based on all the above reasons that I dismissed the suit with costs.